



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 29, 1995

Ms. Claudia Nadig  
Assistant General Counsel  
Texas Workers' Compensation  
Commission  
Southfield Building, MS-4D  
4000 South IH-35  
Austin, Texas 78704

OR95-1632

Dear Ms. Nadig:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code.<sup>1</sup> Your request was assigned ID# 35743.

The Texas Workers' Compensation Commission (the "commission") received a request for information concerning a former employee. You contend that some or all of the requested information is excepted from required public disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.<sup>2</sup>

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<sup>1</sup>We note that the open records laws were substantially amended by the Seventy-fourth Legislature. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, 1995 Tex. Sess. Law Serv. 5127 (Vernon) (to be codified as amendments to Gov't Code ch. 552). The amendments to chapter 552 "affecting the availability of information, the inspection of information, or the copying of information, including the costs for copying information, apply only to a request for information that is received by a governmental body on or after September 1, 1995." *Id.* § 26(a), 1995 Tex. Sess. Law Serv. at 5142 (Vernon). A request for information that is received by a governmental body prior to September 1, 1995, is governed by the law in effect at the time the request is made. *Id.*

<sup>2</sup>You state that the commission will provide the requestor with information responsive to items 1, 3, and 4 of the request for information. Accordingly, we address only item 2 in this ruling.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The commission must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the requestor is the legal representative of the employee in question. You also inform this office that the requestor indicated to the commission by letter dated August 24, 1995, that she has advised her client to file a complaint of employment discrimination with the Equal Employment Opportunity Commission, and that by letter dated August 25, 1995, the requestor indicated that the matter may soon be in litigation. You aver that "[b]ecause the requestor represents a former employee who was terminated by the [c]ommission and has threatened litigation based on the termination and because the information requested in item 2 relates to the termination" the information is excepted from required public disclosure under section 552.103. We agree. However, absent special circumstances, once information has been obtained by all parties to the litigation, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982).

We have reviewed the information submitted for our consideration. Several documents were written by the requestor, written by the commission and addressed to the requestor, written by the employee, or indicate on their face that they were previously released to the employee. This information may not be withheld under section 552.103 of the Government Code. We have marked this information with red post-it flags. In addition, other information that has been previously disclosed to or obtained from the employee may not be withheld under section 552.103.<sup>3</sup> Only one of the documents not excepted under section 552.103 implicates another exception to disclosure raised by the commission, section 552.101 of the Government Code. Accordingly, we will address the applicability of section 552.101 to this document.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure under the common-law right of privacy as section 552.101 incorporates it, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that

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<sup>3</sup>We note that sections 552.107 and 552.111 do not apply to this type of information.

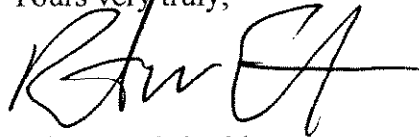
information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. art. 6252-17a, § 3(a)(1)). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

You claim that the information marked in yellow is confidential under common-law privacy in accordance with the ruling in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). We agree. You must, therefore, redact the information you have marked in yellow before releasing the employee's written statement.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Robert W. Schmidt  
Assistant Attorney General  
Open Records Division

RWS/LBC/rho

Ref: ID# 35743

Enclosures: Marked documents

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